

Maine WQS Briefing 4: Status Update and Review Options on Reconsideration October 2017

Purpose

Update status and review options for reconsidering EPA's prior decisions on human health criteria for tribal waters in Maine. On or before December 8, 2017, EPA committed to report to the court what, if any, challenged decisions EPA intends to change based upon the reconsideration, and request an additional stay for whatever additional time the agency needs to make any change.

Agenda

- Background
- Current Status
 - Litigation
 - Mediation
 - Federal Indian law context
- Decision Steps
- Key Considerations

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- Next Steps

Background

- In 2014, Maine sued EPA to require the Agency to act on the State's water quality standards (WQS), including as applied to Indian country (IC) waters used by the Tribes in Maine.
- In 2015, EPA approved and disapproved a number of Maine WQS. Maine sued EPA over a subset of EPA's decisions: 1) the approvals of the designated use (DU) of sustenance fishing for waters in IC, and 2) the resulting disapprovals of HHC that did not protect that DU.¹
- EPA subsequently finalized a federal promulgation to remedy the disapprovals when Maine did not do so. (The federally promulgated HHC also remedied the Administrator's Determination, announced in conjunction with the proposed rule under section 303(d) of the Clean Water Act, that new or revised HHC were necessary to protect the DU of sustenance fishing in waters in IC.) That rule has not been challenged as part of the litigation.
- In February and March 2017, EPA received two petitions, one from the Maine Governor and the other from three dischargers in Maine, to reconsider the sustenance fishing DU approvals, all disapprovals, and the federal promulgation.
- EPA subsequently received letters from the Penobscot Nation and the Houlton Band of Maliseets opposing the petitions for reconsideration. On July 21, 2017, Chief Francis of the Penobscot Nation and the Tribe's legal counsel met with EPA leadership to discuss the issue.
- The court previously granted a 90-day stay of the litigation to allow EPA time to familiarize decision-makers with the rule, litigation, and petitions, and determine whether to reconsider its decisions in light of the petitions.
- On August 10, EPA filed a motion requesting an additional 120 days to reconsider our prior decisions. The court granted this motion, giving EPA until December 8 to complete its reconsideration.
- On August 24, 2017, representatives from AFPA met with OW senior leadership to express concerns about the WQS EPA promulgated in Washington. AFPA also mentioned some of the concerns with EPA's rulemaking in Maine that they previously expressed during the public comment period and during OMB review.

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~~applicable designates uses.~~

Current Status

Litigation

EPA's most recent motion, which the court granted, reads (emphasis added):

EPA currently anticipates that it will complete its reconsideration of the challenged decisions within 120 days. At the end of this time period, EPA will inform the Court and the parties of the result of EPA's reconsideration. Specifically, EPA will decide and report on which, if any, of the challenged decisions EPA intends to change. If EPA determines to change any of the challenged decisions, it may need additional time beyond the requested 120-day stay to effectuate such a change. Therefore, EPA respectfully requests that the proceedings be held in abeyance for an additional 120 days. EPA further requests that it be allowed to seek such relief as is appropriate based upon the result of EPA's reconsideration at the conclusion of the requested stay.

Mediation

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Options

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Next Steps

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